89-804

Supreme Court, U.S.
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CASE NO. _____

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1989

STATE OF MINNESOTA,

Petitioner

vs.

ELI A. HERSHBERGER, et al.,

Respondents

On Writ of Certiorari from the Supreme Court of Minnesota

PETITION FOR WRIT OF CERTIORARI

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105pp

QUESTIONS PRESENTED FOR REVIEW:

1. DOES THE APPLICATION OF MINN. STAT. 169.522 TO THE RESPONDENTS VIOLATE THE RIGHTS OF RESPONDENTS PROTECTED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. DOES THE MINNESOTA SUPREME COURT'S RULING THAT MINN. STAT. 169.522, AS APPLIED TO THESE RESPONDENTS, IS A VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, CONSTITUTE AN ESTABLISHMENT OF RELIGION PROHIBITED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

LIST OF PARTIES:

PETITIONER: State of Minnesota,
County of Fillmore,
(a political
subdivision of the
State of Minnesota)

RESPONDENTS: Harvey E. Hershberger
Fannie E. Hershberger
Sam E. Swartzentruber
Eli A. Hershberger
Emanuel J. Byler
Jacob J. Byler
Menno D. Mast
Benjamin E.Hershberger
Sara Hershberger
Dan D. Swartzentruber
Tobie J. Hershberger
Jacob J. Hershberger
Dan P. Miller
Mattie Miller

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STATEMENT OF GROUNDS

The State of Minnesota seeks review of a decision filed August 18, 1989, by the Minnesota Supreme Court.

The United States Supreme Court has jurisdiction to review this Judgment by Writ of Certiorari pursuant to Title 28 of the United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute 169.522, Subd. 1:

(a) All animal-drawn vehicles, motorized golf carts when operated on designated roadways pursuant to section 169.045, implements of husbandry and other machinery including all road construction machinery, which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving vehicle emblem except when being used in actual construction and maintenance work and traveling within the limits of a construction area which is marked in accordance with requirements of the manual of uniform traffic control devices, as set forth in section 169.06. The emblem shall consist of a fluorescent yellow-orange triangle with a dark red reflective border and be mounted so as to be visible from a distance of not less than 600 feet to the rear. When a primary power unit towing an implement of husbandry or other machinery displays a slow-moving vehicle emblem visible from a distance of 600 feet to the rear, it shall not be necessary to display a similar emblem on the secondary unit. After January 1, 1975 all slow-moving vehicle emblems sold in this state shall be so designed that when properly mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of

head lamps on a motor vehicle. The commissioner of public safety shall adopt standards and specifications for the design and position of mounting the slow-moving vehicle emblem. Such standards and specifications shall be adopted by rule in accordance with the administrative procedure act. A violation of this section shall not be admissible evidence in any civil cause of action arising prior to January 1, 1970.

(b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:

(1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise, and at any other time when visibility is impaired by weather, smoke, fog, or other conditions; and

(2) permanently affix to the rear of the slow-moving vehicle at least 72 square

inches of reflective tape that reflects the color red.

Minnesota Rule 7440.0350:

Subpart 1. Conflicting beliefs. Persons who have sincerely held religious beliefs prohibiting their use of the standard SMV emblem may apply for a permit to display the alternate SMV emblem.

Subpart 2. Application. Applications for permits to display the alternate SMV emblem must be made on an application form prescribed by the commissioner. The application must contain a statement of the conflicting religious principles or tenets on which the applicant's objection to the display of the standard SMV emblem is based.

Subpart 3. Permit use requirements. The alternate SMV emblem may be used only on animal-drawn vehicles. A person operating a vehicle displaying the alternate SMV emblem must have in possession in the vehicle a permit or copy of a permit to display the alternate SMV emblem. A permit is not transferable and may not be used by persons other than employees or immediate household members of the family of a person who has obtained a permit. The permit must be

displayed to a peace officer upon request.

Subpart 4. Permit life. A permit for the display of the alternate SMV emblem is valid for a period of four years.

Subpart 5. Appeal. The decision granting or denying permit requests must be in writing and must set forth the reasons for the action. A person whose application is denied may request a contested case hearing to review the denial, by writing to the commissioner of public safety.

STATEMENT OF THE CASE

I.

FACTS MATERIAL TO THE QUESTION PRESENTED

The respondents in this case are members of the Old Order Amish religion and live in Fillmore County, Minnesota. The Amish mainly use horse-drawn vehicles and travel upon gravel road, black-topped county roads, and U.S. Highway #52, a heavily traveled highway, which passes through their community in Fillmore County. During an eight-month period in 1988, fourteen members of the Old Order Amish religion were issued citations for violating Minnesota Statute 169.522. Such a violation is a petty offense, which does not constitute a crime.

Minn. Stat. 169.522, Subd. 1 (a) requires that slow-moving vehicles, such as a horse-drawn vehicle driven by the Amish, display a yellow-orange triangular emblem to warn other drivers of their presence on the road. Minn. Stat. 169.522, Subd. 1 (b) allows some persons to use an alternative black-white emblem, but only if they first obtain a permit in accordance with the Rules of the Minnesota Department of Public Safety. A permit can only be granted to persons who drive horse-drawn vehicles and hold objections to the yellow-orange emblem based upon a sincerely held religious belief.

HISTORY OF THE PROCEEDINGS

All of respondents' cases were consolidated and set for a formal hearing on October 26, 1988, in the Fillmore County District Court to decide upon the respondents' motion to dismiss the charges on the bases that Minn. Stat. 169.522, Subd. 1 violated the Amish defendants rights to the free exercise of their religion as guaranteed by the First Amendment to the United States Constitution. The trial court concluded that Minn. Stat. 169.522 was Constitutional and did not violate the rights of the defendants protected by the Free Exercise Clause of the First Amendment to the Constitution of the

United States.

At the request of counsel, the trial court then certified the following question to the Minnesota Appellate Courts:

> DOES MINN. STAT. 169.522, WHEN APPLIED TO THESE DEFENDANTS VIOLATE THE RIGHTS OF THE DEFENDANTS PROTECTED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Ultimately , the Minnesota Supreme Court accepted jurisdiction of this certified question.

The Supreme Court of the State of Minnesota concluded the Statute violated the Freedom of Exercise Clause of the First Amendment as it applied to the respondents and to those entertaining

religious beliefs similar to those of the respondents.

ARGUMENT

MINN. STAT. 169.522 DOES NOT VIOLATE RESPONDENTS RIGHTS PROTECTED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Minn. Stat. 169.522 specifically applies to any and all horse-drawn vehicles and all other slow-moving vehicles, which use the public highways of the State of Minnesota.

The purpose of the statute is to provide a unique means of identifying a slow-moving vehicle by making the vehicle more visible to other users of public roads through the use of reflective colors and material on the sign, as well

as to provide for the instant identification of the type of hazardous condition ahead. The size and shape of the triangular emblem has been set so as to conform with the nation-wide accepted standards for the slow-moving vehicle emblem.

This statute is therefore secular in nature and does not attempt to regulate any religious belief or to single out any particular belief for adverse treatment. The statute is accordingly facially neutral, meeting the requirements of Wisconsin v. Yoder, 406 U.S. 205, 220, 92 S.Ct. 1526, 1535 (1972).

The United States Supreme Court recognized and gave sanction to the powers of the State over the use of the

public highways in Hess v. D. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). Some Old Order Amish claim that the requirement they use such signs on public roads is a violation of their right to free exercise of religion as guaranteed by the First Amendment to the Constitution of the United States. To determine whether or not such a violation has occurred, the United States Supreme Court has required a three-part analysis, which was enunciated in United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed 2d 127 (1982). That three-part analysis is essentially as follows:

1. Does a genuine sincere religious belief exist;

2. If so, does the application of

the statute infringe upon the exercise of that religious belief; and

3. If it does so infringe, is that violation nevertheless justified by a compelling state interest which cannot be realized by a less restrictive means.

Petitioner maintains its position that any infringement upon the exercise of a religious belief which occurred was justified by the compelling state interest in safety upon its public highways.

In the instant case, no respondent ever testified as to his/her own personal sincere religious belief that the Minnesota Statute infringes upon their right of free exercise to their religion. Testimony was received from experts who

indicated that some of the Old Order Amish in Fillmore County felt that the use of the slow-moving vehicle sign violated their First Amendment Rights, while other members of the Old Order Amish community did not feel that the use of the sign violated their First Amendment Rights. The Minnesota Supreme Court's decision that the respondents did have a sincere religious belief is accordingly contrary to existing decisions of the United States Supreme Court since no showing of the existence of that personal belief was ever made or required.

THE MINNESOTA SUPREME COURT'S DECISION CONSTITUTES A PROHIBITED ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Any Court, in attempting to accommodate the free exercise of religion, must address the natural antagonism between the protection of the Free Exercise Clauses and the prohibition constraining state religious involvement as set forth by the establishment clause. Each clause in the First Amendment serves as a restraint upon the other. The Minnesota Supreme Court, in arriving at its decision, deliberately did not address the establishment clause in its opinion. (Appendix 1, Footnote 1, page A-46)

The three-part tests developed by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971) requires that state action not have the primary effect of advancing or inhibiting religion. If a primary effect of a state's action is to advance a religion, it must be invalidated under the establishment clause of the First Amendment to the United States Constitution.

The Minnesota Supreme Court, by its decision, excused these respondents, and all "those entertaining religious beliefs similar to those of these * * * (respondents)." (Appendix A-77). The purpose of the Court's decision, is then

exclusively one of assisting a particular religion, specifically the religion of the Old Order Amish. It has the advancement of religious principles as its primary and direct effect. The only persons excused from the application of the statute, are those individuals who can demonstrate the specific religious beliefs demanded. Thus, the benefit to a religious group is specific and not merely as a part of some broad general class or group.

The Minnesota Supreme Court impermissibly advances religion by allowing the Amish special rights, which individuals outside that religious group cannot enjoy. It creates an explicit connection between the state and the

religious order of the Amish. Such a relationship amounts to the "significant symbolic benefit to religion" which government may not bestow. Larkin v. Grendel's Den, Inc., 549 U.S. 116, 125-126, 103 S.Ct. 505, 511, 74 L.Ed. 2d 297 (1982). The U.S. Supreme Court has again recently held that the states may not grant exemptions which can be construed as a state's sponsorship of a religious belief. Texas Monthly, Inc. v. Bullock, 109 S.Ct. Page 890 (1989). The Minnesota Supreme Court, by its failure to consider the First Amendment Establishment Clause in determining the applicability of the First Amendment's Free Exercise Clause, has violated the Establishment Clause of

the First Amendment to the Constitution of the United States.

Petitioner respectfully requests that the United States Supreme Court grant a Writ of Certiorari in this case because the Minnesota Supreme Court has decided a Federal question in a way in conflict with the applicable prior decisions of the U.S. Supreme Court.

Respectfully submitted,

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STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF FILLMORE 3RD JUDICIAL DISTRICT

STATE OF MINNESOTA,

PLAINTIFF,

VS. ORDER

ELI A. HERSHBERGER, ET AL.,

DEFENDANT.

A motion was made for an order of this Court "holding Minn. Stat. Sec. 169.522 unconstitutional in its application and for an order dismissing all of the charges against the defendants in the above-entitled action."

Motion as heard on October 26, 1988, in the District Court at the City of Preston, Fillmore County, State of Minnesota, with the Honorable Clement H.

Snyder presiding. Assistant County Attorney Matthew J. Opat was present on behalf of the State of Minnesota, and Attorney Philip G. Villaume was present with and on behalf of all of the defendants of this consolidated hearing. Both counsel requested an opportunity to submit briefs and both counsel submitted briefs.

The Court, being fully advised in the premises, having reviewed the briefs and law applicable, hereby Orders as follows:

1. That Minn. Stat. 169.522 is constitutional.
2. The charges against the defendants shall not be dismissed.

3. The memorandum attached hereto is incorporated hereby by reference.

ACCORDINGLY, LET JUDGMENT BE ENTERED FORTHWITH.

Dated: December 19, 1988

BY THE COURT:

_____

Clement H. Snyder
Judge of District Court

MEMORANDUM

1. Fourteen members of the Old Order Amish religion, who reside in Fillmore County, State of Minnesota, were issued citations by local law enforcement officers for violations of Minn. Stat. 169.522, Subd. 1, which provides as follows:

> Subdivision 1. (a) All animal-drawn vehicles, motorized golf carts when operated on designated roadways pursuant to section 169.045, implements of husbandry and other machinery, including all road construction machinery, which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving vehicle emblem except when being used in actual construction and maintenance work and traveling within the limits of a construction area which is marked in accordance with requirements of the manual of uniform traffic control devices, as set forth in section 169.06. The emblem shall consist of a fluorescent yellow-orange triangle with a dark red

reflective border and be mounted so as to be visible from a distance of not less than 600 feet to the rear. When a primary power unit towing an implement of husbandry or other machinery displays a slow-moving vehicle emblem visible from a distance of 600 feet to the rear, it shall not be necessary to display a similar emblem on the secondary unit. After January 1, 1975, all slow-moving vehicle emblems sold in this state shall be so designed that when property mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of head lamps on a motor vehicle. The commissioner of public safety shall adopt standards and specifications for the design and position of mounting the slow-moving vehicle emblem. Such standards and specifications shall be adopted by rule in accordance with the administrative procedure act. A violation of this section shall not be admissible evidence in any civil cause of action arising prior to January 1, 1970.

(b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under the rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:

(1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise, and at any other time when visibility is impaired by weather, smoke, fog, or other conditions; and

(2) permanently affix to the rear of the slow-moving vehicle at least 72 square inches of reflective tape that reflects the color red.

These alleged violations occurred between February 1, 1988 and September 30, 1988.

The defendants do not dispute the fact that said statute is facially neutral; is not discriminatory in religious terms and applies to all individuals without religious overtones or connotations. All of the defendants were operating horse-drawn vehicles on a

public highway in Fillmore County, including gravel-topped roads, black-topped county roads and U.S. Highway 52, a heavily-traveled highway, at the time that they were each individually cited for violating the slow-moving vehicle emblem statute. The violations ran the gamut of having no slow-moving vehicle emblem on their horse-drawn black buggies to having the slow-moving vehicle sign (to-wit: the black triangular sign with reflectorized white tape border on the outside) on their horse-drawn vehicle at the wrong time or under adverse weather conditions. In some cases, the vehicles were exhibiting the red lantern and reflective tape outlining the back

portion of their vehicle, but without the triangular SMV sign and, in other cases, they did not have the reflectorized tape on the vehicle.

2. The Amish also travel said roads with horse-drawn implements of husbandry such as flatbed wagons, hay racks, threshing machines, manure spreaders, and log wagons.

3. Minn. Stat. Section 169.01, Subd. 2, defines a "vehicle" as follows:

> 'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks.

4. Professor Lee J. Zook testified that he was born and raised in an Amish-Mennonite community and has studied the

Amish extensively over many years. The Bible and the Confessions of Faith constitute the basis of their doctrine and the foundation of their sincere beliefs. He further testified that the Old Order Amish base their objection to the use of the SMV emblem on the color and/or brightness and the shape of the emblem. He stated that the main objection is the fact that the triangular sign is regarded as a "worldly symbol" and use of the sign is interpreted as putting faith or trust in men and not God.

5. Testimony was also elicited during the trial that the Amish commenced settling in Fillmore County, Minnesota,

in 1973 and were aware of the requirement that the orange iridescent slow-moving vehicle emblem statute was in effect in Minnesota at that time and was applicable to horse-drawn vehicles. It was further determined during the trial that the objection to the use of the orange iridescent SMV sign surfaced in 1985 and prior to that time said SMV sign had been used without confronting and/or disputing the statutory mandate.

6. Testimony was elicited during the trial that the buggies used by the Amish are mainly black in color although some Amish groups have yellow and white buggies. The Amish in Fillmore County only use black buggies and wear black or blue clothing. Admittedly, they use red

kerchiefs; red barns (although they mix black paint with the red paint to produce a dull red color); brightly colored dishware; brightly colored toys; red towels; yellow gloves; stationery red gasoline engines; and orange hunting clothes to comply with legal requirements for hunting.

7. The Amish traditionally paint their homes white and their outbuildings red, including red metal siding on their outbuildings.

8. The dispute as to the use of the SMV emblem has resulted in a severe schism and division amongst the members of the Amish faith in Fillmore County, Minnesota, with some members holding a

sincere belief that it is a violation of the doctrines of their faith to use any SMV sign whatsoever, some holding a sincere belief that they can use the orange reflective triangular sign and some maintaining a sincere belief that they can use the reflectorized tape bordering and outlining their buggies with a red lantern reflecting to the rear of their buggies.

ISSUES

I. Does Minn. Stat., Section 169.522, when applied to these defendants violate the rights of the defendants protected by the Free Exercise Clause of the First Amendment to the Constitution of the United States?

II. Does Minn. Stat., Section 169.522, when applied to these defendants violate the rights of the defendants protected by Article I, Section 16, of the Minnesota Constitution?

COURT'S CONCLUSION

The Court finds and determines that Minn. Stat., Section 169.522, does not violate the rights of the defendants protected by the Free Exercise Clause of the First Amendment to the Constitution of the United States nor does it violate the rights of the defendant protected by Article I, Section 16, of the Minnesota Constitution.

DISCUSSION

I. MINN. STAT., SECTION 169.522, SUBD. 1, WHEN APPLIED TO DEFENDANTS DOES NOT VIOLATE THE RIGHTS OF THE DEFENDANTS PROTECTED BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16, OF THE MINNESOTA CONSTITUTION.

The First Amendment to the Constitution of the United States provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." In one of the leading cases heard by the United States Supreme Court it was held:

> Thus the Amendment (referring to the First Amendment of the United States Constitution) embraces two concepts, --freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of

> society. * * *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. (parentheses supplied)

See Cantwell v. Connecticut, (1940) 310 U.S. 296.

Thus, the Supreme Court determined that government is prohibited from regulating beliefs but is not prohibited from regulating conduct.

The Supreme Court reiterated this holding in Wisconsin v. Yoder (1972), 406 U.S. 205, by providing that a state cannot attempt to regulate religious beliefs or single out a particular religious belief for adverse treatment, but it can issue neutral regulations which have the effect of interfering with

the religious practices of its citizens in the exercise of their undoubted power to promote health, safety and general welfare.

The United States Supreme Court case of Bowen v. Roy (1986), 106 U.S. 2147, supported the concept that a law is constitutional which is facially neutral in religious terms, applies to all users and clearly promotes a legitimate and important public interest. The case of S. Simcha Goldman v. Casper Weinberger, Sec. of Defense, 106 S.Ct. 1310 (1986) held that a rule or law based on a neutral, completely objective standard which is not motivated by hostility against, or any special respect for, any religious faith can be upheld for the

welfare of the public and is constitutional.

The responsible public authority has the right to exercise police powers relating to the use of public highways and streets necessary to provide for and promote the safety, health and general welfare of its citizens with due consideration for the freedom of religious practices.

The two-fold purpose of Minn. Stat., Section 169.522, Subd. 1, by requiring slow-moving vehicles on public highways to have a slow-moving vehicle emblem is to specifically designate such vehicles to the general public and to make such vehicles visible to other users

of the highways.

The color and shape of the SMV emblem as adopted by the legislature was anticipated to create uniformity for all states and provide uniformity on a nationwide basis. That has been substantially accomplished since almost all states have a uniform SMV emblem with some minor variations. It is designated in the Drivers Trainer Manual and this has resulted in universal recognition throughout the state. Defendants contended that the SMV emblem would probably have little meaning to a vehicle driver from a metropolitan area. However, this argument would certainly be more applicable to the other side of this case since the lack of any SMV emblem or

multiple types of SMV emblems would result in more confusion and misunderstanding by a vehicle driver from the metropolitan area. The recognition function by an approaching driver is certainly enhanced by having one uniform sign rather than numerous signs for various vehicles.

The Supreme Court has held that the following factors should be considered in making a decision as to the constitutionality of a statute in balancing the right to the freedom of religion and the power to legislate for the good, safety, and welfare of the public, to-wit:

(1) Does a genuine sincere

religious belief exist; and

(2) If so, does the application of the statute infringe upon the exercise of that religious belief; and

(3) If it does, is that infringement nevertheless justified by a compelling state interest of the highest order; and

(4) If it is so justified, is there a less restrictive alternative available.

Recognizing that the State has a burden to prove that the statute is constitutional, the Court deems that it would be appropriate to consider each of these factors and state its comments

deemed applicable to each of these factors.

A. THE COURT DETERMINES THAT DEFENDANTS DO NOT HAVE A COLLECTIVE GENUINE SINCERE RELIGIOUS BELIEF EXISTING ON THE ISSUE OF THE SMV EMBLEM.

The defendants' beliefs are alleged to be based on their interpretation of scripture as contained in the Bible and the Confession of Faith in conjunction with historical and religious tradition within their faith. The testimony elicited at the trial substantiates the fact that the Amish were aware of the SMV emblem statute when they migrated to the State of Minnesota and settled in the locality of Fillmore County, Minnesota. In addition, the members of the Old Order

Amish group who established residence in this area used the regulation SMV sign for a period in excess of ten years before determining that it was objectionable. Subsequently, the members of the Amish group in Fillmore County divided into three separate sects relative to the use of these signs with one group adhering to the alleged belief that the use of any SMV sign is anathema regardless of color or form of symbol; another group is willing to use and do use the regulation SMV sign with the iridescent orange center and reflectorized red border on a triangular form and the third group is willing to use and do use the black and white triangular SMV emblem with reflectorized

tape border on their buggies and carry the red lantern but will not carry the regulation orange sign.

The evidence presented at this trial shows that the matter of religious belief reflects the individual choice of the personal Amish and not a sincere belief held by the community as a whole. Further, the evidence suggests that the most substantive objection was to the fact that it was a "worldly symbol" and such "worldly symbol" indicates conformity to a requirement dictated by man and not by God. However, such "worldly symbol" was being used for a considerable period of time before objection by the Amish community and a

substantial number of the Amish do not object on the basis of a sincere religious belief at this time.

B. THE COURT DETERMINES THAT APPLICATION OF THE STATUTE DOES INFRINGE UPON THE EXERCISE OF THE RELIGIOUS BELIEF OF SOME MEMBERS OF THE AMISH COMMUNITY BUT DOES NOT INFRINGE UPON THE SINCERE BELIEF OF OTHERS.

Certainly a substantial number of the Amish group hold a sincere religious belief that the SMV sign is a "worldly symbol" but that belief has developed in the recent past and is not steeped and rooted in the historical and traditional background of their religion.

The requirement by statute to use and display the SMV emblem is not a minor infringement on their religious belief and should not be so interpreted and

construed by the Court. The Courts (whether the United States Supreme Court, State Supreme Court, or a lesser Court) have not concerned or made their determinations on the substantiality or lack thereof of the infringement on the religious beliefs of the religious congregation. However, the Courts have expressed concern and delved into a determination as to whether the religious belief is a belief shared by the religious community as a whole as contrasted with the belief of a small sector of the entire group and what effect it has on the entire religious community. We do not have that unity of sincere belief amongst the entire

religious group.

C. THE COURT DETERMINES THAT THE INFRINGEMENT IS WARRANTED BY A COMPELLING STATE INTEREST OF THE HIGHEST ORDER.

It is of paramount importance to protect the health, safety and welfare of the public and the infringement in this situation is warranted by a compelling state interest. The horse-drawn vehicles of the Amish travel on the township, county and state and federal thoroughfares and highways. These roads are heavily traveled by fast-moving motor vehicles and large, heavy trucks. The traffic is substantial regardless of the surrounding weather conditions such as fog, darkness, ice, rain, strong winds and snowstorms. Numerous traffic

regulations have been established to protect the health, safety and welfare of the public and all travelers on the public highways, whether horse-drawn vehicles, pedestrians or motor vehicles.

Testimony given at the trial affirmed the fact that the members of the Amish community are concerned with safety and welfare of the general public as much as any other person. Indeed they testified that red lanterns were used at night to assist in protecting all users of our public roads even when not required by law.

One of the witnesses testified that white reflectorized tape on the borders of the horse-drawn buggies was more visible at night than the regulation SMV

sign. However, the witness also acknowledged that certain circumstances would negate the effectiveness of the white reflectorized tape such as use in daylight or during a snow storm.

The Colorado Supreme Court held in the case of David Johnson, et al. v. Motor Vehicle Division, Department of Revenue, 593 P.2d 1363 (Col. 1979), that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion, but even when action is in accord with one's religious convictions, it is not totally free from legislative restrictions. See also Wisconsin v. Yoder (1972), 406 U.S. 205.

The safety and welfare of all persons using our public highways certainly outweighs and overrides the objection to using the SMV sign because such sign violates their religious convictions to live in a community separate from the modern world and its influences or the fact that it constitutes a worldly symbol.

Highway safety is a legitimate and compelling state interest. The state and its legislature has a duty and obligation to negate and alleviate clear and present dangers to safety, health and general welfare of the public as a whole. The legislature has the right--indeed, the duty--to enact reasonable regulations on the use of the highways and promote

the welfare of the users of such thoroughfares. The United States Supreme Court sanctioned the plenary power of the states to govern use of public highways in Hess v. Pawloski (1927), 274 U.S. 52, when it stated:

> Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways.

D. THE COURT DETERMINES THAT THE SMV EMBLEM IS THE LEAST RESTRICTIVE ALTERNATIVE.

The case of Quaring v. Peterson (1984), 728 F.2d 1121, a U.S. Court of Appeals, Eighth Circuit case, held:

> The state may justify a limitation on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest.

Relative to this particular case, the least restrictive alternative is either the black and white or red and orange triangular SMV emblem as established by legislative mandate enunciated in Minn. Stat., Section 169.522, Subd. 1. The legislature has established an alternative specifically for the Amish community which provides them with two alternative warning devices after thoroughly examining the risks of slow-moving vehicles on the much traveled highways and weighing the safety factors involved for the welfare and care of both the slow-moving vehicle and surrounding

traffic.

The SMV sign is almost universally the same in design and recognition throughout the United States. It is included in most Driver's Trainers Manuals so it is easily recognized in all areas by all users of our highways. In addition, the statute has made it minimally intrusive on the vehicle since it is only required to be on the rearmost part of the slow-moving vehicle.

If a determination was made to use the alternative reflectorized tape on border and red lantern which is acceptable to the Amish community it would result in additional confusion for other drivers on the highways. It

certainly would be conducive to confusion and bewilderment, for example, if every governmental unit were to develop and implement entirely different stop signs, stop lights or other traffic symbols.

C. PRECEDENT AND OTHER CASES.

The United States Supreme Court noted in the case of Cantwell v. State of Connecticut (1986) 310 U.S. 296, as follows:

> In passing upon the constitutionality of a statute it must be borne in mind that a large discretion is necessarily vested in the state legislature to determine not only what the interests of public convenience and welfare requires, but what measures are necessary to secure such interests. * * * It is the duty of a court in the exercise of great care and caution to make every presumption and intendment in favor of the validity of a statute and sustain a legislative enactment unless its

> invalidity is demonstrated beyond a reasonable doubt. (Underlining supplied.)

A member of the Constitutional Convention and later Chief Justice, Oliver Ellsworth, wrote in 1787:

> But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion.

This is obviously a case of first impression in the State of Minnesota and the statute adopted by the legislature must be held constitutional unless its invalidity is adequately demonstrated. The Court has decided that the defendants have failed to show the statute is constitutionally invalid and the State of Minnesota has proved that there is a compelling state interest in providing a

uniform and facially neutral SMV emblem applicable to all slow moving vehicles. There is no universally recognizable sign or symbol that is less restrictive and/or less obtrusive to the users of the sign and to the safety and welfare of the general public than has been enacted in the present statute and mandated by the legislature.

The requirement to install reflectorized tape around the border of any and all slow-moving vehicles and carry a red lantern would entail an expenditure of considerably more effort and expense in the installation as well as maintenance and upkeep of said border and warning device when compared with a

triangular sign which is transferable from one vehicle to another.

Also, the enactment of a statute incorporating and mandating the suggested warning paraphenalia recommended and accepted by the members of the Amish community would then make such slow-moving vehicle sign a man-made (not God-made) object. It would then become a worldly symbol according to the evidence presented in this case and become anathema to the Old Order Amish Congregation. The Court queries as to whether or not that would result in a judicial determination as to the constitutionality of the new symbol. The Court thinks so. The cases relating to SMV signs cited by the defendants are

State v. Swartzentruber, 429 NW2d 225 (Mich. App. 1988); Fussner v. Smith, No. C-76-363 (D. Ohio Nov. 28, 1977); and State v. Weaver, No. 77-TR-D-634 (Holmes County Court, Ohio, Sept. 7, 1977). All of those cases are distinguishable from the case before the Court herein and do not constitute precedent-setting case in relation to this case.

In the Swartzentruber case the Court stated that the decision may have ben different if the State had vigorously contested the matter on the element of compelling state interest. Further, the Michigan statute did not refer specifically to "animal-drawn vehicles" as provided in the Minnesota statute but

referred only to "slow-moving vehicles."

In the two Ohio cases of Fussner v. Smith and State v. Weaver, the Court did not directly rule on the constitutionality or unconstitutionality of the particular statute involved and, in addition, the Ohio Department of Public Safety had reached a settlement agreement providing for an alternative warning system for horse-drawn vehicles and the Court actions enjoined enforcement of the SMV emblem statute as applied to Amish vehicles.

The Kentucky case, Commonwealth v. Zook, (1985), Barron County District Court, Ky., August 3, 1985, held that the state has an unquestionably legitimate state interest in promoting the safety of

citizens traveling on highways and the particular statute involved was not determined to be unconstitutional.

D. CONCLUSION

The defendants have failed to meet their burden of proof in showing that the statute is arbitrary and unreasonable. The presumption of constitutionality has not been adequately rebutted by the defendants and the state has met its burden in proving that the infringement on religious beliefs is minimal and such violation is justified by a compelling state interest in requiring a uniform and universally recognized SMV emblem.

The general principle is that all statutes are constitutional unless they

are shown to be invalid and such invalidity has not been shown in this case. The statute is held to be constitutional.

C.H.S.

STATE OF MINNESOTA

IN SUPREME COURT

C9-88-2623

Fillmore County Kelley, J.

State of Minnesota,

Plaintiff,

vs.

Eli A. Hershberger, et al.,

Defendants.

Filed: August 18, 1989
Office of Appellate Courts

SYLLABUS

Minn. Stat. Sec. 169.522 (1988), a statute mandating the display of triangular reflective identification emblems on slow-moving vehicles during operation on the public highways, as applied to individuals who entertain

sincerely held religious beliefs prohibiting their compliance therewith, violates the rights afforded to them by the Free Exercise Clause of the United States Constitution.

Certified question answered.

Heard, considered and decided by the court en banc.

OPINION

KELLEY, Justice.

A Minnesota statute (Minn. Stat. Section 169.522) (1988) requires slow-moving vehicles to display a fluorescent orange-red triangular sign emblem when being operated on the state's public highways. Appellants, members of the Old Order Amish religion ("The Amish")

moved in the district court for dismissal of traffic citations each had received for noncompliance with the statute's display requirement. They claimed that the statute, by subjecting them to criminal penalties for noncompliance with the display requirement, infringed upon their right to freely exercise their religious beliefs which is afforded to them by the First Amendment to the United States Constitution and Article I, Section 16 of the Minnesota Constitution. The trial court rejected their claim, but it did certify the constitutional questions to the court of appeals pursuant to Rule 28.03, Minnesota Rules of Criminal Procedure. Upon application from the court of appeals, we accepted

accelerated review pursuant to Minn R. Civ.App. P. 118. We conclude that Minn. Stat. Section 169.522, as applied to these appellants, infringes upon rights guaranteed to them by the Free Exercise Clause of the First Amendment of the Federal Constitution. Because that conclusion disposes of this appeal, we do not address appellants' claim that the statute as applied violates the appellants' right to freedom of conscience guaranteed to them by Article I, Section 16 of the Minnesota Constitution, but rather reserve that

issue for another day.[1] We vacate the trial court's order and dismiss the charges against these appellants.

Each of the 14 appellants resides in Fillmore County, and each is a member of the Old Order Amish religion. A principal tenet of that religion is that its adherents remain separate and apart from the modern world. This concept of separation emanates from Christian

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1 The issues raised by the constitutional questions certified relate to whether the statute, as applied, infringes upon the rights afforded appellants under the Free Exercise Clause of the First Amendment to the United States Constitution or Article I, Section 16 of the Minnesota Constitution. Amicus Minnesota Civil Liberties Union filed a brief in which it did not directly address the issues raised by the certified questions, but rather focused upon arguments under the Establishment Clause. Ordinarily, when questions have

Biblical directions to "be not conformed to this world," see Romans 12:2; and "Be ye not unequally yoked together with unbelievers," see II Corinthians 6:14, and is embodied in the basic document of the sect - the Articles of Confession. Based on that concept of separation, the Amish travel primarily by horse and buggy. In Fillmore County the buggy style typically used may be described as a four-sided black box, on wheels, drawn by a horse. Some members of the Amish

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(Footnote 1 continued)

been certified, briefs of amici should address issues raised by the questions. Since appellants do not raise an Establishment Clause argument, we do not address it in this opinion.

community, although generally subscribing to the sect's concept of separation, are apparently willing to accommodate that concept with the requirement of Minn. Stat. Section 169.522. These appellants, however, are unwilling to compromise their belief that the "loud" colors required and the "worldly symbols" the triangular shape represents to them conflicts with the admonitions found in Apostle Paul's Epistles. To them to do so would be putting their faith in "worldly symbols" rather than in God. Between February and September, 1988, each appellant received a traffic citation for operating a slow-moving vehicle (SMV), one of the black buggies, on the public highway in Fillmore County

without displaying the SMV reflectorized triangle emblem mandated, or the alternate black triangular emblem permitted, by Minn. Stat. Section 169.522 (1988).

Subdivision 1(a) of the statute requires that when operated on a public highway, a slow-moving vehicle must display an orange-red fluorescent triangular emblem. Under limited circumstances, subdivision 1(b) of the statute authorizes the Commissioner of Transportation to issue permits to display, instead, a dull black triangle with a white reflective border plus 72 square inches of permanent red reflective tape. Even though an operator possesses

a permit, he or she must also carry a "regular" orange-red emblem in the vehicle which must be displayed externally during times of darkness or low visibility.[2] Pursuant to the statute, the Commissioner promulgated Minn. Rule 7440.0350.[3] The rule generally limits issuance of permits to those whose religious beliefs preclude them from compliance with the "regular" display requirments of the statute.

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2 Relevant provisions of the statute are:

> Subdivision 1. (a) All animal-drawn vehicles, * * * implements of husbandry and other machinery * * * which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving vehicle emblem * * *. The emblem shall consist of a

(Footnote 2 continued)

fluorescent yellow-orange triangle with a dark red reflective border and be mounted so as to be visible from a distance of not less than 600 feet to the rear. * * * After January 1, 1975, all slow-moving vehicle emblems sold in this state shall be so designed that when properly mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of head lamps on a motor vehicle. * * *.

(b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:

(1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise, and at any other time when visibility is impaired by weather,

(Footnote 2 continued)

smoke, fog, or other conditions; and

(2) permanently affix to the rear of the slow-moving vehicle at least 72 square inches of reflective tape that reflects the color red.

Minn. Stat. Section 169.522, subd. 1 (1988).

3 Minn. Rule 7440.0350 provides:

Subpart 1. **Conflicting beliefs.** Persons who have sincerely held religious beliefs prohibiting their use of the standard SMV emblem may apply for a permit to display the alternative SMV emblem.

Subpart 2. **Application.** Applications for permits to display the alternate SMV emblem must be made on an application form prescribed by the commissioner. The application must contain a statement of the conflicting religious principals or tenets on which the applicant's objection to the display of the standard SMV emblem is based.

(Footnote 3 continued)

Subpart 3. **Permit use requirements.** The alternate SMV emblem may be used only on animal-drawn vehicles. A person operating a vehicle displaying the alternate SMV emblem must have in possession in the vehicle a permit or copy of a permit to display the alternate SMV emblem. A permit is not transferable and may not be used by persons other than employees or immediate household members of the family of a person who has obtained a permit. The permit must be displayed to a peace officer upon request.

Subpart 4. **Permit life.** A permit for the display of the alternate SMV emblem is valid for a period of four years.

Subpart 5. **Appeal.** The decision granting or denying permit requests must be in writing and must set forth the reasons for the action. A person whose application is denied may request a contested case hearing to review the denial, by writing to the commissioner of public safety.

Because we are persuaded that as applied, Minn. Stat. Section 169.522 violates the rights of these appellants under the Free Exercise Clause of the First Amendment to the United States Constitution, we do not address the second certified question relating to the validity of the statute as applied under Article I, Section 16 of the Minnesota Constitution, but, instead, reserve that issue for another day.

We address the Free Exercise Clause claim by observing that the United States Supreme Court has considered three factors to predominate in an evaluation of a Free Exercise Clause claim: (1) Is the objector's claim based on a sincerely held religious belief? (2) Does the

government regulation burden the exercise of that religious belief? and, (3) Is the burden justified by a compelling state interest, which cannot be served by a less intrusive alternative? See, e.g., Thomas v. Review Bd. of Indiana Employment Sec., 450 U.S. 707, 713-19 (1981). In the instant case, the trial court's analysis of appellants' Free Exercise Clause claim commenced with, and appears to be based upon, its conclusion that these specific Amish appellants did not have a sincerely held religious belief because "the matter of religious belief reflects the individual choice of the personal Amish and not a sincere belief held by the community as a whole."

These appellants argue that the trial court improperly constricted "the sincerely held belief" requirement by adding thereto that to be "sincere" the belief must be shared by the religious community as a whole. The state, of course, urges that we affirm the trial court's construction.[4]

Our research has revealed no relevant case of the United States

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4 The state relies on evidence that the practice of individual members of the Amish community may differ with respect to their attitude toward, and the actual display of, SMV signs on their vehicles. Indeed, the record contains evidence that not all adherents of the Amish community regard the display of the orange-red reflectorized triangular emblem as a violation of the precepts of the Amish religion. However, as later explained, what is relevant to the inquiry is the

Supreme Court in which it has ever required one who asserts a violation of rights under the Free Exercise Clause of the First Amendment, as applied to the states through the Fourteenth Amendment, to demonstrate that the sincerity of his or her belief comports with a religious tenet or principle uniformly and sincerely held by a religious community of which he or she is a member. Indeed,

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(Footnote 4 continued)

sincerity of the belief of the individual raising the Free Exercise Clause challenge, not the general acceptance of the belief by all in the religious community.

its holdings relating to the specific issue, so far as we have been able to ascertain, have uniformly rejected similar contentions when advanced in cases involving Free Exercise Clause rights. For example, in Thomas, 450 U.S. at 714, the Supreme Court specified that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Rather, the Court explained, the focus is on whether the one claiming the right individually has a sincere religious belief.

> We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect

> religious beliefs* * *.Intra-faith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-16. (Emphasis supplied). See also Sherbert v. Verner, 374 U.S 398 (1963); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1986)

(both cases were denial of unemployment compensation by states where the challenger refused Saturday work because of religious beliefs). More recently, in Frazee v. Illinois Dep't of Employment Sec., _____ U.S. _____, 109 S. Ct. 1514 (1989), the Supreme Court expressly rejected identical assertions to those articulated here by the trial court and urged upon us by the state. In Frazee, the Illinois Board of Review, the Circuit Court of the 10th Judicial Circuit of Illinois, and the Appellate Court of Illinois, Third District, had all denied Frazee unemployment benefits because his claim rested on his "personal professed belief." Specifically the Illinois

Appellate Court said "the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect." Frazee v. Dep't of Employment Sec., 159 Ill. App. 3d 474, 478, 512 N.E.2d 789, 792 (1987). In rejecting such reasoning, the United States Supreme Court said "Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[5]

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5 In Quaring v. Peterson, 728 F.2d 1121, 1124-25 (8th Cir. 1984), aff'd by an equally divided Court sub nom. Jensen v. Quaring, 472 U.S. 478 (1985), the one claiming a Nebraska statute which

Frazee, _____ U.S. at _____, 109 S. Ct. at 1517. In the instant case, though the trial court did not make a specific finding, it did implicitly determine that application of the statute infringed upon the personal sincere religious beliefs of

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(Footnote 5 continued)

required a driver's photograph on a state issued driver's license unconstitutionally infringed on her rights guaranteed by the Free Exercise Clause was found to have possessed a sincere religious belief notwithstanding that other members of her church did not adopt her interpretation of the Christian Bible. See also L. Tribe, American Constitutional Law, Sec. 14-12 at 1245-46 (2d ed. 1988). "The perception of the claimant's sincerity inevitably reflects the factfinder's view of the reasonableness of the claimant's beliefs.* * *[T]he very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity."

appellants although not all in the Fillmore County Amish community adhered to those same beliefs. The fact that at least one of the appellants has already actually suffered jail incarceration, and that the others have persistently expressed a willingness to do so rather than comply with the statute, must assuredly buttress that implicit finding that the appellants individually possessed a personal sincerity of belief. Sherbert, Thomas, Hobbie, and Frazee were all cases where an individual challenger claimed denial of unemployment compensation for refusal to engage in employment which allegedly infringed upon his or her rights under the Free Exercise Clause. In none of those cases did the

United States Supreme Court require that the claimant's belief be shared by the community as a whole. We perceive no reason why an analysis which is valid for unemployment compensation purposes should be less valid when employed to ascertain the existence of a sincere religious belief in the context of criminal proceedings. Therefore, we hold that these appellants have met the initial test enunciated in Thomas by establishing that their sincerely held religious beliefs protected them from displaying the reflectorized emblem or the alternates required by the statute.

We turn next to consider whether, under the second factor of the Thomas

test, application of the statute burdens the exercise of the appellants' religious beliefs. Without question, it does. In both Thomas and Hobbie the United States Supreme Court held that because each claimant had been "forced to choose between fidelity to religious belief and * * * employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." Hobbie, 480 U.S. at 144. Surely, if the infringement of rights under the Free Exercise Clause is substantiated when the consequence involves merely temporary deprivation of unemployment compensation, the potentiality, if not the certainty, of

criminal sanctions including fines or jail time equally and substantially infringes upon the rights these appellants enjoy in the free exercise of their religious beliefs under the First Amendment. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). Even in Bowen v. Roy, 476 U.S. 693 (1986), wherein the United States Supreme Court denied a claimant's challenge because it found the burden caused by the requirement of the use of a social security number with respect to qualification for AFDC benefits to be indirect and incidental, the court said "we cannot ignore the reality that denial of such benefits by a uniformly

applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." Id. at 704. Here, the burden on these Amish appellants is substantial. They face a choice of either adhering to their religious beliefs by refusing to adopt "worldly symbols" bearing "loud colors" and suffering the consequent criminal sanctions therefor, or rejecting those beliefs in order to comply with the SMV statute.

Even though a challenger who asserts a Free Exercise claim has succeeded in establishing the existence of a sincerely

held belief and that the state's action has substantially burdened the Free Exercise Clause right, the third requirement of a Thomas analysis involves an inquiry into whether the burden is justified by a compelling state interest which cannot be served by a less intrusive alternative. For example, in Sherbert v. Verner the Court required the state to demonstrate a compelling interest, and "that no alternative forms of regulation would [serve the state's interest] without infringing on First Amendment rights." Sherbert, 374 U.S. at 406-07. The Supreme Court of the United States has adhered to the compelling interest--least restrictive alternative

test likewise in later cases. See Yoder, 406 U.S. at 215 (only those interests of a "highest order" can infringe on religious beliefs); Hobbie, 480 U.S. at 140-41 (compelling state interest).[6]

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6 Some suggestion has been advanced that the United States Supreme Court has recently diminished the state burden by broadly defining the state's interests and by lowering the accommodation requirement by its decisions in Goldman v. Weinberger, 475 U.S. 503 (1986) and United States v. Lee, 455 U.S. 252 (1982). See L. Tribe, supra, Section 14-13 at 1261. Professor Tribe suggests, however, that the lowered burden for the state is reserved for situations where government actions burden religious choices only incidentally, whereas the stricter and higher standards are reserved for and applicable to situations where government action compels the individual to choose betewen religious beliefs and government benefits or avoidance of criminal sanctions. See L. Tribe, supra, Section 14-13 at 1262-63.

The trial court found that the "safety and welfare of all persons using our public highways outweighs and overrides the objection to using the SMV sign * * *." The appellants argue that such a finding lacks any evidentiary support, because, in fact, the state presented no evidence to support the public safety issue claimed.

The state interest claimed here, of course, involves public safety to all who travel on the state's highways. Admittedly, the state presented no evidence of accident incidence involving vehicles displaying the SMV emblem as contrasted with that of those not

displaying it. The evidence on the issue consisted, in essence, of acknowledgment by "experts" in the course of testimony that the statutory SMV emblem is almost universally recognized nationwide as designating a slow-moving vehicle, plus some nonspecific anecdotal claims of residents of Fillmore County of dangers associated with encounters involving Amish vehicles on the highway.

Although we have reservations as to whether the evidence actually presented by the state in the trial court was quantitatively or qualitatively sufficient to establish a compelling state interest, highway safety, for the purpose of addressing appellants' challenge to the statute in this case we

judicially notice that the state's concern for safety of the public using the highways, including these appellants, is a legitimate compelling state interest.

Thus, the question of the existence of a less restrictive alternative remains. The state argues that Rule 7440.0530 provides a less restrictive alternative. We agree with the appellants that it does not. At best, the rule only partially eases the statutory burden on the Free Exercise rights of the appellants. While the rule does authorize the issuance of permits to operators allowing the use of an alternate emblem plus 72 square inches of

permanently official red tape, an operator of a SMV is not in compliance with the statute unless, additionally, during daylight hours, the vehicle contains a "regular" emblem, nor at night or in foul weather, unless that "regular" emblem is externally displayed on the vehicle in addition to the red reflectorized tape. Moreover, even the alternative provided by Minn. Stat. Section 169.522, subd. 1(b), when authorized by a permit issued pursuant to Minn. Rule 7440.0350, is burdensome to the religious beliefs of these appellants who shun "worldly ways." The alternate requirement that a black triangular sign be displayed during daylight hours and, as well, that permanently affixed red

reflective tape be employed is no less anathema to the appellants and considered by them to be a burden on their personal religious beliefs than the "regular" statutory requirement of display of the emblem as provided in section 169.522, subdivision 1(a). Additionally, as appellants point out, the alternate SMV emblem fails to provide more warning of the presence of a SMV on the highway to motor vehicular traffic than does the black square horse-drawn buggy itself, which, as a matter of common sense, serves as a warning that the vehicle is moving at less than prevalent highway speeds for motorized vehicles. Furthermore, appellants note, state and

county authorities have posted highway traffic signs depicting a black horse and buggy configuration in areas where Amish horse-drawn buggies are commonly encountered. The record contains no evidence which supports any conclusion that the display of the statutory alternate emblem during daylight hours provides an alternative less restrictive and less burdensome on appellants' First Amendment Free Exercise Clause rights.

Furthermore, at night, and during foul weather, the display requirements of the statute are more onerous to those who, like these appellants, harbor the personal belief that their religion forbids compliance, than upon those who do not share such beliefs. At night, in

addition to being required to display the "regular" emblem they must likewise display 72 square inches of red reflectorized tape. The appellants here assert that since they do not object on religious grounds to outlining the boxes of their buggies with silver reflective tape - a color they consider acceptable because not "loud" - or to displaying red lit lanterns as a supplement to the silver reflective tape, that there does exist a less restrictive alternative to serve the state's public safety concerns. They further point out that testimony at the hearing established that the silver reflectorized tape was at least as bright, if not brighter than that

outlining either triangular emblem mandated by the statute. The state contends its public safety concern is enhanced by the general recognition by the public of the orange-red triangular emblem as designating a SMV. The appellants counter by noting that the state itself has created an exception to that alleged desired uniformity, when, by section 169.522, subdivision 1(b), it has permitted in certain circumstances an alternative display (the black triangle-red reflectorized tape), which, though personally equally objectionable to appellants on religious grounds, is of questionable superiority on public safety grounds to the alternative suggested by appellants.

We conclude that the state's public safety interest would not be significantly diminished were it to permit the use at night of silver reflective tape used in connection with the display of lighted red lanterns by these appellants, and by those entertaining religious beliefs similar to those of these appellants, and that, therefore, it has failed to establish that a less restrictive alternative would not serve its public safety concerns.

Accordingly, we hold that these appellants have established that each has a sincerely-held religious belief that forbids him from displaying the SMV emblems required by Minn. Stat. Section

169.522; that state enforcement of Minn. Stat. Section 169.522 which subjects these appellants to criminal prosecution, with resultant potential fines or jail incarceration, burdens the appellants' rights under the Free Exercise Clause; that the state has a compelling public safety interest which Minn. Stat. Section 169.522 seeks to serve; but that the state's compelling public safety interest can be served by a less restrictive alternative; and that, therefore, Minn. Stat. Section 169.522 as applied against these appellants violates the Free Exercise Clause of the First Amendment to the United States Constitution. Therefore, we answer the first certified question in the affirmative.

Having so concluded, it is unnecessary for us to consider the second question certified by the trial court which asks whether Minn. Stat. Section 169.522 as applied to these defendants violates Article I, Section 16 of the Minnesota Constitution. Therefore, we do not address that issue, and express no opinion on the issue posed, reserving its consideration to a later date in a different case.

The decision of the trial court denying the motion of these appellants to dismiss all pending charges is vacated, and those charges are hereby dismissed.

89-804

CASE NO. _____

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF MINNESOTA,

Petitioner

vs.

ELI A. HERSHBERGER, et al.,

Respondents

On Petition for Writ of Certiorari
to the Supreme Court of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether forcing the Old Order Amish in southern Minnesota to use the orange fluorescent or black triangular slow-moving vehicle symbol on their horse-drawn vehicles violates the free exercise clause of the first amendment to the United States Constitution?

(2) Whether the Minnesota Supreme Court 7-0 unanimous decision, that the Minnesota slow-moving vehicle emblem statute as applied to the Old Order Amish violates the free exercise clause of the first amendment to the United States Constitution, constitutes an establishment of religion prohibited by the first amendment to the United States Constitution?

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JURISDICTION

The Minnesota Supreme Court, by unanimous decision filed August 18, 1989, held that Minnesota Statute Section 169.522 (1988), mandating display of triangular reflective identification emblems on slow-moving vehicles during operation on the public highways, violates the rights afforded the Amish by the free exercise clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute 169.522 (Subd. 1):

(a) All animal-drawn vehicles, motorized golf carts when operated on designated roadways pursuant to section 169.045, implements of husbandry and other machinery including all road construction machinery, which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving vehicle emblem except when being used in actual construction and maintenance work and traveling within the limits of a construction area which is marked in accordance with requirements of the manual of uniform traffic control devices, as set forth in section 169.06. The emblem shall consist of a fluorescent yellow-orange triangle with a dark red reflective border and be mounted so as to be visible from a

distance of not less than 600 feet to the rear. When a primary power unit towing an implement of husbandry or other machinery displays a slow-moving vehicle emblem visible from a distance of 600 feet to the rear, it shall not be necessary to display a similar emblem on the secondary unit. After January 1, 1975 all slow-moving vehicle emblems sold in this state shall be so designed that when properly mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of head lamps on a motor vehicle. The commissioner of public safety shall adopt standards and specifications for the design and position of mounting the slow-moving vehicle emblem. Such standards and specifications shall be adopted by rule in accordance with the administrative procedure act. A violation of this section shall not be admissible evidence in any civil cause of action arising prior to January 1, 1970.

(b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:

(1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise,

and at any other time when visibility is impaired by weather, smoke, fog, or other conditions; and

(2) permanently affix to the rear of the slow-moving vehicle at least 72 square inches of reflective tape that reflects the color red.

Minnesota Rule 7440.0350:

Subpart 1. Conflicting beliefs. Persons who have sincerely held religious beliefs prohibiting their use of the standard SMV emblem may apply for a permit to display the alternate SMV emblem.

Subpart 2. Application. Applications for permits to display the alternate SMV emblem must be made on an application form prescribed by the commissioner. The application must contain a statement of the conflicting religious principles or tenets on which the applicant's objection to the display of the standard SMV emblem is based.

Subpart 3. Permit use requirements. The alternate SMV emblem may be used only on animal-drawn vehicles. A person operating a vehicle displaying the alternate SMV emblem must have in possession in the vehicle a permit or copy of a permit to display the alternate SMV emblem. A permit is not transferable and may not be used by persons other than employees or immediate household members of the

family of a person who has obtained a permit. The permit must be displayed to a peace officer upon request.

Subpart 4. Permit life. A permit for the display of the alternate SMV emblem is valid for a period of four years.

Subpart 5. Appeal. The decision granting or denying permit requests must be in writing and must set forth the reasons for the action. A person whose application is denied may request a contested case hearing to review the denial, by writing to the commissioner of public safety.

STATEMENT OF THE CASE

On October 26, 1988, the Honorable Clement H. Snyder, District Court Judge of the Third Judicial District, County of Fillmore, State of Minnesota presided over a hearing on the Amish defendants' motion to dismiss criminal charges on the grounds that Minnesota Statute Section 169.522 violated the defendants' constitutional rights protected by the free exercise clause of the first amendment of the United States Constitution and Article 1 Section 16 of the Minnesota State Constitution. Trial Judge Snyder denied the Amish defendants' motion to dismiss and held the statute to be constitutional under the U. S. and the Minnesota Constitutions in his December 19, 1988 Order.

Upon request of defense counsel and prosecuting attorney, Judge Snyder certified the matter to the Minnesota Court of Appeals as an important or doubtful question.

On January 5, 1989, the Honorable Donald D. Wozniak, Chief Judge of the State of Minnesota Court of Appeals, ordered the certification of the appeal to the Minnesota Supreme Court for decision. On January 19, 1989, the Minnesota Supreme Court approved the certification transferring the matter to the Minnesota Supreme Court.

On August 18, 1989, the Minnesota Supreme Court in a unanimous (7-0) decision held that Minnesota Statute Section 169.522 (1988), as applied to individuals who entertain sincerely held religious beliefs prohibiting their

compliance therewith, violates the right afforded to them by the free exercise clause of the United States Constitution.

The County of Fillmore is petitioning the United States Supreme Court for a Writ of Certiorari alleging that 1) the Minnesota Supreme Court decision was incorrect in its understanding of free exercise of religion and 2) the Minnesota Supreme Court's decision violates the establishment clause of the United States Constitution.

ARGUMENT

The unanimous decision (7-0) of the Minnesota Supreme Court is correct. It does not conflict with any decision of the United States Supreme Court or decision of any state court which has ruled on similar facts. Further review is unwarranted.

1. It must be noted that Minnesota Attorney General Hubert Humphrey III, in his capacity as Minnesota Attorney General, has not petitioned the United States Supreme Court for review. The petition has been filed by Fillmore County Attorney Robert R. Benson in his capacity as a County Attorney of the State of Minnesota. Minnesota Attorney General Hubert Humphrey III did not brief nor argue the case on behalf of the State of Minnesota in the Minnesota

Supreme Court. This is unusual. In cases in which the constitutionality of a Statute of the State of Minnesota is questioned, the Attorney General typically represents Minnesota. The respondents can only assume the Minnesota Attorney General does not think this case should be appealed.

2. The decision of the Minnesota Supreme Court was a unanimous (7-0) decision. It is entirely consistent with every court in every state which has dealt with the Amish and the slow moving emblem highway sign. In each of these cases, every court has ruled for the Amish. See State v. Swartzentruber, 429 N.W.2d 225 (Mich. App. 1988). Commonwealth v. Zook, No. 85-T-264 (Baron Count District, Ky., Aug. 3, 1985); Fussner v. Smith, No. C-76-363,

N.D. Ohio (Nov. 28,1977); State v. Weaver, No. 77-TR-D-364, Holmes County Ct., Ohio (Sept. 7, 1977).

3. The Minnesota Statute as applied to individuals who hold a sincere religious belief violates the free exercise of religion of the first amendment of the United States Constitution.

Sherbert v. Verner, 374 U.S. 398 (1963), Wisconsin v. Yoder, 406 U.S. 205 (1972), and United States v. Lee, 455 U.S. 252 (1982) provide the federal test to measure when a state regulation may burden free exercise of religion. Under the test, it is necessary to inquire:

(1) Does a genuine religious claim exist?

(2) If so, does the application of the statute infringe upon the free exercise of that religious claim;

(3) If it does, is that

infringement justified by a compelling state interest not realizable by less restrictive means?

The Minnesota Supreme Court held it was proven that these 14 particular defendants hold a genuine sincere religious belief that the orange fluorescent and/or black triangle were worldly symbols so that forced use of such worldly symbols violates their religious beliefs. The Court also held that "as applied to individuals who entertained [such] sincerely-held religious beliefs" Minnesota Statute 169.522 (1988) violated the free exercise clause of the United States Constitution. In other words, not only were the free exercise rights of the 14 named individuals violated, but any other individuals who entertain sincerely-held religious beliefs

concerning this matter also have their free exercise rights violated.

4. The Minnesota Supreme Court held there are less restrictive alternatives available to requiring the Amish to use a fluorescent orange or black triangular worldly symbol. The Minnesota Supreme Court took judicial notice that the State's concern for public safety on the highways is a legitimate compelling state interest. The Court held "the State's compelling public safety interest can be served by a less restrictive alternative." In holding there is a less restrictive alternative available to Minnesota Statue § 169.522 (1988) and Rule 7440.0350, the Court said:

> "We conclude that the state's public safety interest would not be significantly diminished were it to permit the use at night of silver

> reflective tape used in connection with the display of lighted red lanterns by these appellants and by those that are entertaining religious beliefs similar to those of these appellants, ...and that, therefore, it has failed to establish that a less restrictive alternative would not serve its public safety concerns."

The Amish agree with the Minnesota Supreme Court. The State does have a compelling State interest in the safety of the public on the highways. The Amish also agree with the Minnesota Supreme Court's holding that the outlining of the horse-drawn vehicles by silver reflective tape plus the use of the traditional red lantern is a less restrictive alternative to requiring the Amish to use the worldly symbol of a fluorescent orange or black triangle. The State's compelling interest is protected while the Amish' free exercise rights are accommodated by the Minnesota

Supreme Court decision.

5. The County of Fillmore in its Petition For Writ of Certiorari seems to be arguing that because the Minnesota Supreme Court held (1) that the Amish have a genuine sincere religious belief that the use of these worldly symbols violates their religion and (2) that there is a less restrictive alternative to achieving the State's compelling State interest then ipso facto the Minnesota Supreme Court decision establishes religion. Fillmore County is incorrect in its understanding of establishment of religion. Because a statute or a case grants an accommodation for a sincere religious belief does not ipso facto establish religion. Fillmore County in its Petition [Page 19] states:

> "Any court, in attempting to accommodate the free exercise of religion, must address the natural antagonism between the protection of the free exercise clauses and the prohibition constraining state religious involvement as set forth by the establishment clause." [Emphasis added]

Fillmore County misunderstands the two religion clauses in the first amendment. There is not a "natural antagonism"; rather the two clauses reinforce one another. Courts simply attempt "to find a neutral course between the two religion clauses." Walz v. Tax Commissioner, 397 U.S. 664, 668-69 (1970). In attempting to reconcile the two clauses the United States Supreme Court has acknowledged the importance of a zone of accommodation. This zone of accommodation recognizes that government actions impinge on

different persons in dramatically different ways. Truly even-handed treatment at times compels accommodating those whose religious beliefs are exceptionally burdened by a challenged state action. L. Tribe, American Constitutional Law, 2d, 1168 (1988). Accommodation does not include practices whereby government affirmatively supports or endorses a particular religion.

Legislatures as well as courts are free to make accommodations. See, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 107 Supreme Court 2862, 2869 (1987) "there is ample room for[legislative] accommodation of religion under the establishment clause"; Wallace v. Jaffrey, 472 U.S.

38, 83 (1985), O'Connor, J. concurring in judgment, "the term accommodation is the practice or policy whereby government steps aside or creates an exemption in order to produce free exercise neutrality." The first amendment does not prohibit or mandate religion. It prohibits establishment and mandates tolerance of free exercise. Thus, the free exercise clause sometimes requires a state to accommodate religion. Thus, for example, Thomas v. Review Board, 407 U.S. 707 (1981) the State was required to exempt from unemployment benefit regulations a Jehovah Witness who quit his job in a weapons foundry because of a sincerely-held religious belief.

The Supreme Court may create a free exercise exemption for people who

religiously oppose war, Thomas v. Review Board, supra; Congress may require that the land worshiped by Native Americans be left unspoiled, see 42 U.S. Code Section 1996; and a City may prohibit bars within a certain distance of churches, Larkin v. Grendel's Den, Inc. 459 U.S. 116 (1982). None of these accommodations of religion violate the Establishment Clause.

Government violates the establishment clause only if its actions are born of religious intent, or if they exert primarily religious effects, or if they create excessive church/state entanglement. Accommodating religion to permit the free exercise thereof does not automatically establish religion as Fillmore County argues. In several cases, the Supreme Court has required

that personal choices born of religious motivations be exempted from otherwise valid and formally neutral state requirements. In Sherbert v. Verner, 374 U.S 398 (1963) the Court required the State to make unemployment benefits available to Seventh-Day Adventist who for religious reasons refused to work on Saturdays. Thomas v. Review Board 450 U.S 707 (1981) reaffirmed and extended Sherbert. Hobbie v. Unemployment Appeals Commission, 107 S. Ct. 1046 (1987) reaffirms Sherbert by yet again, applying it to a recent convert to the Seventh-Day Adventist Church. In Wisconsin v. Yoder, supra, the Court, mandated a free exercise exemption law. Yoder exempted the Amish from Wisconsin's law requiring school

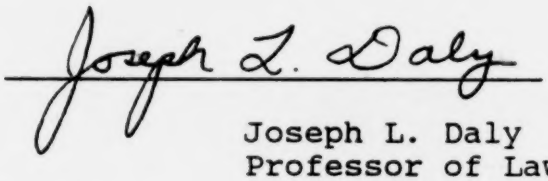
attendance, because the law would have gravely jeopardized the religions very survival.

There is ample room for legislatures and courts to craft religious accommodations and yet not establish religion. The natural result of tolerating religion as broadly as possible is accommodation. That is precisely what the Minnesota Supreme Court has done. It has not established religion by allowing the Amish to use reflective tape and the traditional red lantern on their buggies instead of forcing them to use an orange fluorescent or black worldly symbol. Let the Amish "be not conformed." Romans 12:2.

CONCLUSION

The Petition For Writ Of Certiorari requested by the County of Fillmore, the State of Minnesota should be denied.

Respectfully submitted,



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Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MINNESOTA,

Petitioner,

v.

ELI A. HERSHBERGER, et. al.,

Respondents.

BRIEF OF MINNESOTA CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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INTEREST OF THE MINNESOTA CIVIL LIBERTIES UNION

The Minnesota Civil Liberties Union ("MCLU") appears as amicus curiae with the written consent of both parties. The MCLU is a non-profit, non-partisan organization appearing here to protect the rights and liberties established by United States Constitution.

It is the position of the MCLU that the Minnesota Supreme Court failed to recognize and correctly resolve the conflict this case presents between two branches of Free Exercise jurisprudence, and misapplied the precedent on which it did rely. These errors result in a decision that abrogates the Minnesota Legislature's authority to regulate conduct on government highways through commonly recognized signs of uniform size and shape, thus endangering interstate and local traffic on its highways.

ARGUMENT

This case exposes the collision between two branches of Free Exercise jurisprudence: Bowen v. Roy, 476 U.S. 693 (1986) and Lyng v. Northwest Indian Cemetery Protective Ass'n., 108 S. Ct. 1319 (1988) on one side, and Wisconsin v. Yoder, 406 U.S. 205 (1972), Sherbert v. Verner, 374 U.S. 398 (1963), Thomas v. Review Board, 450 U.S. 707 (1981) and Hobbie v. Unemployment Commission, 107 S. Ct. 1046 (1987) on the other.

The Minnesota Supreme Court failed to follow Bowen v. Roy and its extension in Lyng, thereby deciding this case without considering relevant doctrines requiring a contrary outcome. Instead, the Minnesota Supreme Court analyzed this case under Wisconsin v. Yoder and Sherbert, but in so doing, it misconstrued those cases to again reach an incorrect result.

The errors in the Minnesota Supreme Court decision are of greater than merely local, Minnesota concern. Other states have faced similar legal questions and reached equally erroneous results.[1]

Moreover, the Respondents in this case reside in Fillmore County, along the Minnesota-Iowa border, surrounding an interstate highway. The hazard that the Minnesota Supreme Court created by sanctioning Respondents' use of unmarked slow-moving vehicles on the highways affects interstate as well as local traffic safety. Trial Court Order and Memorandum, p. 12 (Dec. 19, 1988).

Finally, the reasoning underlying the Minnesota Supreme Court's decision

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1. See, e.g., State v. Swartzentruber, 429 N.W.2d 225 (Mich. App. 1988) appeal den'd., 432 N.W.2d 872 (1989); Commonwealth v. Zook, No. 85-T-264 (Barron County District Court, Ky., Aug. 3, 1985); Fussner v. Smith, No. C-76-363 (N.D. Ohio, Nov. 28, 1977); State v. Weaver, No. 77-TR-D-634 (Holmes County Court, Ohio, Sept. 7, 1977).

results in broad legal consequences. Not only is safety jeopardized for local and interstate travellers, but a State Legislature has lost authority to assure safety on government roadways.

The conflict between Yoder or Sherbert and Lyng v. Northwest Indian Cemetery Protective Ass'n. centers on the extent to which the Constitution empowers citizens to veto facially neutral government regulations that have incidental effects making it more difficult to practice certain religions, but that do not prohibit the free exercise of religion. Where the effects on religious practices are incidental to the State's regulation of its own land, First Amendment strict scrutiny is not implicated. Lyng, 108 S. Ct. at 1326.

In analyzing whether religious effects are incidental here, it is important to note that this case is not like Wisconsin

v. Yoder. Yoder involved forcing Amish children to attend school until age 16. The Court noted that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable . . . ." Yoder, 406 U.S. at 218. The instant case presents a far more incidental effect because the Respondents here are under no compulsion to use the government roadways. Rather, only when the Respondents voluntarily use the State's lands must they conform their use to neutral state safety standards that depend for their effectiveness on uniformity and general recognizability.

Voluntariness has long been a focus of the Court's evaluation of state activity that has incidental effects on religious practice. For example, in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), the Court explained that

> [w]here a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution . . . . [T]hose who take advantage of its opportunities may not on ground of conscious refuse compliance with such conditions. Hamilton v. Regents 293 U.S. 245 [(1934)].

319 U.S. at 631-632. See also Abington School District v. Schempp, 374 U.S. 203, 252-53 (1963) (Brennan, J. concurring). The instant case does not present the government coercion against which Yoder, Schempp and Barnette guard.

Nor do the Court's unemployment compensation cases require a contrary result. Sherbert, Thomas and Hobbie dealt with state denials of benefits to individuals who did not work because circumstances of employment conflicted with religious beliefs. The Court's application of a strict scrutiny analysis in those cases is distinguishable from this action on two important grounds.

First, the unemployment compensation cases involved the States' explicit determination to single out religious belief from a host of other circumstances that do justify an individual's unemployment. In contrast, Minnesota has approved no "exemptions" to use of SMV emblems while targeting religious beliefs for exclusion. Rather, the State demonstrated that a slow-moving vehicle ("SMV") symbol of a single shape and size is critical to conveying the safety message.

Second, Sherbert, Thomas and Hobbie implicated neither continuing government control over the public use of its property nor state interests in public safety.

Lyng held that facially neutral government acts "which may make it more difficult to practice certain religions but which have no tendency to coerce

individuals into acting contrary to their religious beliefs," are not within the prohibition of the First Amendment. Lyng, 108 S. Ct. at 1326. Despite the reality that Native Americans may lose their ability to practice their religion, the exercise of which is intimately bound-up in National Forest land, they may "not divest the Government of its right to use what is, after all, its land." Lyng, 108 S. Ct. at 1327 (emphasis in original). The petitioners in Lyng must acquiesce in government control over the use of government land which significantly effects their religious practices.

Similarly, the Respondents in this case are required to acquiesce in neutral government regulation of its roadways. The SMV law concededly is facially neutral. To excuse conformity with state safety regulations would be tantamount to

granting Respondents "de facto beneficial ownership of some rather spacious tracts of public property" Lyng, 108 S. Ct. at 1327, because their insistence on traveling the State's highways without displaying the State's SMV emblem renders those roadways hazardous to the rest of the travelling public.

Requiring Respondents to affix a conforming sign to their vehicle if they choose to use Minnesota roadways does not distinguish this case from the rationale of Lyng and Roy. The Native Americans in Lyng had to alter their religious practices to accommodate road construction on the sacred lands that serve as the central focus of their religion. In Roy the government was permitted to use a social security number against individual will, without implicating First Amendment prohibitions. If Roy and Lyng demonstrate only

incidental effects of permissible government programs on religious belief, this case even more strikingly compels the conclusion that the Respondents are not unduly burdened. Unlike the Native Americans in Roy and Lyng, Respondents have voluntarily subjected themselves to neutral government regulation by opting to use State roads.

The MCLU suggests that, like the petitioners in Lyng, the Respondents' religious beliefs are only incidentally effected by Minnesota Statutes § 169.522. Respondents may no more dictate safety standards on State property for themselves and the travelling public than the Native Americans in Lyng may prohibit road construction on National Forest property, or, as a logical extension, dictate State regulation of the use of that road once it is built.

The Minnesota Supreme Court ignored Lyng and only superficially addressed Roy v. Bowen, noting a distinction between a burden accompanied "by threat of penal sanction" and the facts of Roy which did not present an identical threat. State v. Hershberger, 444 N.W.2d at 287. This distinction rests merely on the procedural posture on which these cases arose, rather than on a workable analysis of the interests.

For example, had the Native Americans in Lyng insisted on conducting a religious ceremony in the middle of the government's road construction, they too may have been subject to penal sanction. Instead, the Lyng petitioners sought a judicial determination of the government's activity rather than violate the law. The Respondents here could have sought a declaratory judgment holding Minnesota Statute § 169.522 unconsti-

tutional, but instead, it was only by their deliberate violation of the law that this challenge arose.

The Minnesota Supreme Court's casual dismissal of Roy v. Bowen analysis led that court to the wrong result. For the reasons this Court expressed in Lyng, First Amendment protection does not extend to Respondents' conduct here, and the lower court decision should therefore be reversed.

Although the Minnesota Supreme Court should not have required the State to bring forward a compelling justification for its otherwise lawful actions, that court also erred in its application of strict scrutiny analysis.

Strict scrutiny review requires that the court determine whether a compelling state interest can be achieved by less intrusive means. See, e.g., Thomas, 450 U.S. at 713-19. The Minnesota Supreme

Court has conceded that "the State's concern for safety of the public using the highways, including Respondents, is a legitimate compelling state interest." State v. Hershberger, 444 N.W.2d at 288. Public safety is a strong justification for upholding legislation in the face of a Free Exercise challenge.

As this Court explained in Sherbert, 374 U.S. at 403:

> [T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." Braunfeld v. Brown, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L.Ed.2d 563. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. (citations omitted).

The Respondents' insistence on using the roads without displaying an SMV symbol of uniform size and shape is a hazard to

public safety that should not be shielded by the First Amendment.

The findings of the Trial Court demonstrate that, for three reasons, there is no less intrusive means of achieving public safety while accommodating Respondents. First, the SMV symbol is "almost universally the same in design and recognition throughout the United States. It is included in most Driver's Trainer Manuals so it is easily recognizable in all areas by all users of our highways." Trial Court Order and Memorandum, pp. 14-17 (Dec. 19, 1988). The State proved that instant recognition and understanding through an emblem of uniform size and shape must be preserved to promote highway safety.

Second, the Minnesota Supreme Court erroneously rationalized that, because the State allowed one alternative color scheme, the Court was free to conclude

that any number of alternative shapes and sizes of reflectorized warnings are equally efficacious. State v. Hershberger, 444 N.W.2d at 289.

The mistake of the Minnesota Supreme Court is that it ignored the Trial Court's determination that uniformity of size and shape, which is consistent in both the regular and alternative emblem, is essential for achieving the state's compelling safety objectives.

Finally, there is no less intrusive means of serving the State's need for recognized signage to achieve its compelling interest. The State demonstrated that random arrangement of lanterns and reflective tape, which the Minnesota Supreme Court approved, does not provide a uniform, recognizable indication that a vehicle is slow-moving. Where no alternative means exists which would satisfy both the state's compelling

interest and the Respondents' First Amendment rights, the State's interests must prevail. Yoder, 406 U.S. at 215; United States v. Lee, 455 U.S. 252, 259-62 (1982).

The three-part test developed in Lemon v. Kurtzman, 403 U.S. 603 (1971) serves as a foundation for Establishment Clause analysis. First, government action must serve a secular purpose. Second, a primary effect of government action cannot be to advance religion. Third, government action cannot foster an excessive entanglement of the State with religion.

The result of the Minnesota Supreme Court's failure to acknowledge that under Lyng the incidental effects of Minnesota's SMV law on Respondents' religious beliefs disqualify this case for strict scrutiny, and its further failure to recognize that the Minnesota

Legislature's compelling interest in promoting highway safety is not served by reflector tape markings of random size and shape, is that Respondents and all "those entertaining religious beliefs similar to those of these [Respondents]," 444 N.W.2d at 289, are uniquely privileged to use Minnesota's highways displaying no warning markings at all.

The decision has the effect of exclusively assisting one particular religion, the Old Order Amish, in the advancement of its religious doctrine that a triangular SMV sign is a "Worldly Symbol" signifying that the user is putting faith or trust in men and not God. Cf. Trial Court Order and Memorandum at 4. The Minnesota Supreme Court's decision creates an explicit connection between the State and the religious order of the Amish, advancing that religion by allowing its proponents

special rights, which individuals outside that religious group cannot enjoy, and which is motivated wholly by religious considerations. Cf. Lynch v. Donnelly, 465 U.S. 668 (1984); Stone v. Graham, 449 U.S. 39 (1980).

Reversal of the Minnesota Supreme Court's decision further requires the Court to consider Minnesota Rule 7440.0350 (See Brief of Petitioner at 8), which implements Minnesota Statutes § 169.522, Subd. 1(b) (See Brief of Petitioner at 7), and expressly limits the class of individuals who may display an alternate SMV symbol only to persons who "have sincerely held religious beliefs prohibiting their use of the standard SMV emblem" and who make an application containing "a statement of the conflicting religious principles or tenets upon which the Applicant's objection to the display of the standard

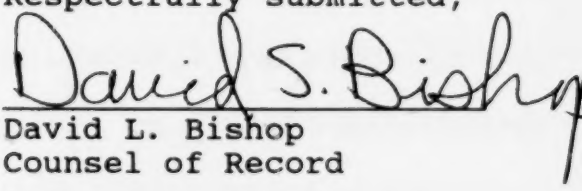
SMV emblem is based." The State's rules implementing its alternate SMV emblem statute were created solely to provide the Amish with a benefit in keeping with their particular religious beliefs, with no discernible secular purpose, and with the primary, if not exclusive effect of advancing Respondents' religion. Cf. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985). Upon remand, the trial court must consider whether the statute as implemented by the Minnesota Rules is unconstitutional because both its purpose and its effect are flawed.

CONCLUSION

The Minnesota Civil Liberties Union, as amicus, respectfully requests that the United States Supreme Court grant a writ of certiorari in this case to determine whether Respondents' religious beliefs

are incidental to facially neutral State regulation of its land and internal affairs, and whether the State's Statute demonstrates the least intrusive means of serving its interest in promoting uniform highway safety. It is the position of the MCLU that the Minnesota Supreme Court has decided a federal question in conflict with the applicable prior decisions of this Court.

Respectfully submitted,



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